Philip Lindsay Brook v Mirza Mohamed Tariq Beg bin Mirza HH Beg

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-1773–10 OF 2014
DAVID WONG, ZAWAWI SALLEH AND HASNAH HASHIM JJCA
14 SEPTEMBER 2016

Tort — Defamation — Defamatory statements — Respondent alleged appellant published letter containing statements defamatory of respondent to various third parties — Whether offending statements defamatory — Whether letter published by appellant to various third parties — Qualified privilege — Whether appellant acted maliciously

The respondent was the managing director of a company known as Perunding Pakarmedia Sdn Bhd ('Pakar') and had resigned from his position on 5 March 2009 whereas the appellant was the CEO of a company known as Carat Media Services (M) Sdn Bhd ('Carat'). Carat held 35% shares in Pakar. Upon his appointment as CEO, the appellant issued to the respondent a letter ('the impugned letter') responding to issues and grievances raised by the respondent through all his previous correspondences to Margaret Lim ('ML'), the former director/CEO of Carat and Pakar who had resigned. On this matter, ML had given evidence that during her tenure as CEO of Pakar she faced numerous difficult issues which ultimately led to her resignation. The impugned letter was copied to the Pakar's Board of Directors and to the specific firm of solicitor, Messrs Raja Darryl & Loh. In consequence, the respondent filed an action for defamation against the appellant and alleged that the appellant had published the impugned letter to various third parties. The trial court allowed the claim, hence this appeal. The respondent contended that the words used in their natural and ordinary meaning were defamatory. On the other hand, the appellant did not plead the statutory defence of justification but contended that the said letter was not defamatory of the respondent. The appellant further submitted that the impugned letter was published on an occasion of qualified privilege. The issues for consideration were: (a) whether the offending statements were defamatory; and (b) whether the said impugned letter was published by the appellant to a third person.

Held, allowing the appeal with costs of RM70,000 here and below subject to allocatur; and setting aside the decision of the High Court:

(1) The impugned letter was devoid of any mention or reference of any form of ill treatment of ML by the respondent. The learned High Court judge had erred when she disregarded the testimony of ML herself who had

explained to the court her reason for resigning. The impugned letter concerned the operational issues and did not refer to the respondent's character in the manner alleged. On plain reading of the words used in the impugned letter, the appellant was responding and explaining the issues raised by the respondent in previous correspondences. By doing so, he was merely carrying out his duty as CEO of Pakar. The statements were general statements made in the ordinary course of business and not capable of being understood to be defamatory in the manner alleged by the respondent (see paras 35, 43 & 45).

(2) The impugned letter was only copied to four specific persons, the directors and the specific solicitor. The impugned letter was sent in a sealed envelope with the acknowledgment of receipt on the envelope and the contents intact. There were no evidentiary proof that the impugned letter was widely circulated or anyone in the firm had read the letter (see para 48).

(3) The respondent did not give any particulars of the facts and matters in which malice could be inferred. Further, there was no proof that the appellant had acted recklessly or maliciously against the interest of the company. In essence, the impugned letter did not contain any element maligning the respondent's character other than stating specific facts relating to the ordinary course of business (see para 50).

[Bahasa Malaysia summary

Responden adalah pengarah urusan syarikat yang dikenali sebagai Perunding Pakarmedia Sdn Bhd ('Pakar') dan telah meletakkan jawatan pada 5 Mac 2009 sementara perayu adalah Ketua Pegawai Eksekutif ('KPE') syarikat yang dikenali sebagai Carat Media Services (M) Sdn Bhd ('Carat'). Carat memegang saham sebanyak 35% dalam Pakar. Atas pelantikannya sebagai KPE, perayu telah mengeluarkan surat kepada responden ('surat yang disoalkan') dalam menjawab kepada isu-isu dan runggutan yang dibangkitkan oleh responden melalui kesemua surat-menyuratnya yang lalu kepada Margaret Lim ('ML'), bekas pengarah/KPE Carat dan Pakar yang telah meletakkan jawatan. Atas perkara ini, ML telah memberikan keterangan bahawa semasa dia memegang jawatan sebagai KPE Pakar dia menghadapi pelbagai isu-isu yang sukar yang mengakibatkan peletakan jawatannya. Surat yang disoalkan tersebut dihantar kepada Lembaga Pengarah Pakar dan kepada firma peguam yang spesifik, Tetuan Raja Darryl & Loh. Akibatnya, responden memfailkan tindakan bagi fitnah terhadap perayu dan mendakwa bahawa perayu telah menerbitkan surat yang disoalkan kepada pelbagai pihak ketiga. Mahkamah perbicaraan membenarkan tuntutan tersebut, maka rayuan ini. Responden berhujah bahawa perkataan-perkataan yang digunakan dalam maksud biasa adalah fitnah. Sebaliknya, perayu tidak memplid pembelaan statutori justifikasi tetapi berhujah bahawa surat tersebut bukan fitnah terhadap responden. Perayu selanjutnya berhujah bahawa surat yang disoalkan tersebut diterbitkan atas

keadaan perlindungan bersyarat. Isu-isu untuk dipertimbangkan adalah: (a) sama ada pernyataan yang menyinggungkan tersebut adalah fitnah; dan (b) sama ada surat yang disoalkan tersebut diterbitkan oleh perayu kepada pihak ketiga.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM70,000 di mahkamah ini dan Mahkamah Tinggi tertakluk kepada alokatur; dan mengetepikan keputusan Mahkamah Tinggi:

(1) Surat yang disoal tidak menyebut apa-apa atau rujukan terhadap apa-apa bentuk perlakuan buruk ML oleh responden. Hakim Mahkamah Tinggi yang bijaksana telah tersilap apabila beliau tidak mempedulikan keterangan ML sendiri yang telah menjelaskan kepada mahkamah alasannya untuk meletak jawatan. Surat yang disoal tersebut adalah berkenaan isu-isu operasi dan tidak merujuk kepada sikap responden dalam cara yang didakwa. Atas pembacaan biasa perkataan-perkataan yang digunakan dalam surat disoalkan, perayu adalah menjawab dan menjelaskan isu-isu yang dibangkitkan oleh responden dalam surat-menyurat yang lalu. Dengan berbuat demikian, dia hanya menjalankan tugasnya sebagai KPE Pakar. Pernyataan adalah pernyataan am yang dibuat dalam perjalanan biasa perniagaan dan tidak boleh difahami sebagai fitnah dalam cara yang didakwa oleh responden (lihat perenggan 35, 43 & 45).

(2) Surat yang disoalkan hanya dihantar kepada empat orang spesifik, pengarah-pengarah dan peguam spesifik. Surat yang disoalkan tersebut dihantar dalam sampul surat yang ditutup dengan akuan penerimaan atas sampul surat dan kandungannya dalam keadaan baik. Tidak terdapat bukti jelas bahawa surat yang disoalkan diedarkan secara luas atau sesiapa di dalam firma telah membaca surat tersebut (lihat perenggan 48).

(3) Responden tidak memberi apa-apa butir mengenai fakta dan perkara yang mana niat jahat boleh dibuat kesimpulan. Selanjutnya, tidak terdapat bukti bahawa perayu telah bertindak secara semberono atau berniat jahat terhadap kepentingan syarikat. Pada dasarnya, surat yang disoalkan tidak menggandungi apa-apa unsur memburukkan sifat responden selain daripada menyatakan fakta spesifik berkaitan kepada perjalanan biasa perniagaan (lihat perenggan 50).]

Notes

For cases on defamatory statements, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 434–455.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321, HC (refd)

Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, CA (refd)
Pullman and another v Walter Hill & Co, Limited [1891] 1 QB 524, CA (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (refd)

Appeal from: Civil Suit No S-23–44 of 2009 (High Court, Kuala Lumpur)

Ng Sai Yeang (Chong Juen Quan with her) (Raja Darryl & Loh) for the appellant.
Renu Zechariah (Rosley Zechariah) for the respondent.

Hasnah Hashim JCA:

[1] The appeal before us was against the decision of the learned High Court judge in Kuala Lumpur High Court Civil Suit No S-23–44 of 2009 which on 22 September 2014 allowed the respondent's claim for defamation arising from the letter dated 3 April 2009 ('the impugned letter') and awarded general damages in the sum of RM300,000 and aggravated damages in the sum of RM100,000. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] After having heard and considered the submissions of the respective counsels, we allowed the appeal and set aside the award for damages. We now give our reasons for doing so.

BACKGROUND

[3] The plaintiff is a shareholder, director and former managing director of a company by the name of Perunding Pakarmedia Sdn Bhd ('Pakar'). He was appointed the Managing Director of Pakar from the date of its inception until he resigned on 5 March 2009. Pakar is in the business of providing media specialist services and was incorporated on 13 February 2002.

[4] The defendant is an employee of one of the companies in the group of companies to which Carat Media Services (M) Sdn Bhd ('Carat') and Aegis Media Malaysia Sdn Bhd ('Aegis') are part of. Carat is a locally incorporated company wherein Group Carat (Nederland) BV is the major shareholder. Carat holds 35% shares in Pakar. Margaret Lim who is also known as Margaret Low Sui Lui ('ML') is a director of both Carat and Pakar. Carat appointed Caren Fong ('Caren') and Narumon Arunavaranont ('Narumon') to the Pakar's Board of Directors. The defendant was nominated by Carat to sit on the Board of Directors of Pakar on 20 February 2009 and as CEO on the 21 April 2009.

He was appointed as CEO when ML resigned sometime in April 2009. His appointment was agreed upon by the shareholders pursuant to a shareholders agreement.

[5] The plaintiff resigned as managing director on 5 March 2009. However, prior to his resignation, the plaintiff terminated Haneda Omar, Pakar's Financial Controller on 18 August 2008. He also terminated Zulhisham Ayob on 19 September 2008 who was the Managing Partner of Pakar.

[6] The plaintiff by a letter dated 19 February 2009 had queried the Board of Directors of Pakar with regard to the defendant's appointment as CEO. The defendant is based in Singapore and sometime in October 2008 came down to Malaysia to advise Carat with regard to the disputes between the plaintiff with the shareholders as well as the directors of Carat. Upon his appointment, the defendant issued the impugned letter to the plaintiff responding to the many issues and grievances raised by the plaintiff through all his previous correspondences to ML. The impugned letter was copied to the Pakar's Board of Directors namely, Caren, Nurumon, Haneda and her husband, Zulhisham and to the specific firm of solicitor, Messrs Raja Darryl & Loh.

[7] The plaintiff filed a civil suit alleging that the defendant had published and/or caused to be published the impugned letter to various third parties which was published/circulated and read by employee(s) of Pakar, its directors, Messrs Raja Darryl & Loh, by the staff/employee/s of Carat/Aegis Group, the Singapore, India and Hong Kong regional offices of Carat to which the Carat/Aegis fell under and to which group the defendant was attached and employed at the material time. The plaintiff's claim against the defendant is based on the tort of defamation.

THE ALLEGED DEFAMATORY STATEMENTS

[8] We set out the alleged defamatory statements in the impugned letter below:

(i) Margaret Lim wishes to resign from her position as Chief Executive Officer of Pakarmedia, not least in part due to your past and recent conduct in respect of Pakarmedia and her personally;

(ii) Your threats and allegations against Looi, a Carat employee, are completely unfounded and he has not in any way tampered with Pakarmedia documents and records. Your demand is petty and completely unwarranted and will be highlighted to the relevant authorities should you attempt to pursue any baseless police report.

(iii) I will be recommending to the Pakarmedia Board of Directors that Pakarmedia should be taking all steps necessary to recover payment of the

costs incurred in having to defend the frivolous actions filed both in seeking the injunction and in purporting to see the appointment of auditors.

(iv) Your failure to do so will be considered theft and conversion and pursued accordingly.

(v) ... you are no longer in gainful employment and that you do not have assets or income or any reasonable prospect of securing adequate income sufficient to meet the costs payable or to meet the undertakings on damages.

(vi) ... you have personally purportedly authorized media bookings directly with media owners , in breach of Pakarmedia's service agreement with Carat and in breach of the shareholders' agreement.
('the offending statements').

[9] It is the plaintiffs pleaded case that the words used in their natural and ordinary meaning were defamatory and were meant to mean, amongst others, that the plaintiff:

(a) was dishonest;

(b) in breach of his fiduciary duties;

(c) committed some form of wrongdoing;

(d) committed fraud as regard to the finances of Pakar;

(e) conspired to defraud Pakar and its shareholders and directors; and

(f) was a miscreant director.

[10] The plaintiff contended that the defendant had issued the impugned letter maliciously and in bad faith. The words used in the impugned letter were calculated to disparage the plaintiff and as a consequence he suffered considerable distress and embarrassment. The plaintiff's personal reputation have been adversely affected and caused him to be despised and injured.

[11] The defendant did not plead the statutory defences of justification but averred that the said letter was not defamatory of the plaintiff. Even though the impugned letter was not marked 'private and confidential' it was addressed only to the board of directors and the a specific solicitor of Pakar.

[12] The defendant further contended that the said letter was published on an occasion of qualified privilege. He had issued the said impugned letter in his capacity as the CEO designate of Pakar. The aforesaid letter was fair comment on matters of public interest and intended to provide an amicable resolution to

deal with the ongoing internal disputes within Pakar. The defendant was under a duty to propose and provide a solution and to deal with pending problems and issues plaguing Pakar.

THE HIGH COURT DECISION

[13] The learned High Court judge found that the defendant had proven that the impugned letter was defamatory. The plaintiff is a well known personality in the media industry and therefore such a letter was damaging to the reputation of the plaintiff. The defence of qualified privilege does not apply as the defendant contradicted the offending statement as to the plaintiff's treatment of ML as well as other contradictions in the testimonies of the other witnesses.

[14] The offending statements and the imputations were libelous as there were insufficient facts stated or inferred to enable readers to distinguish between the facts and the comments. The statements of fact in the impugned letter were also not proven to be true.

[15] The learned High Court judge found that the since the impugned letter was not marked as 'private and confidential' there was a great probability that the staff of Messer Raja Darryl & Loh could have read it.

THE APPEAL

[16] The appeal was grounded upon the following grounds:

(a) that the impugned words complained of are not defamatory;

(b) the words were made in the ordinary course of business under qualified privilege and were fair comment;

(c) there was no extensive publication as the impugned letter was sent to four persons who were Pakar's directors and to a specific solicitor;

(d) the plaintiff did not suffer any loss of reputation and could not prove his loss. The award for general damages of RM300,000 was highly excessive and exorbitant;

(e) the plaintiff was not entitled to an award of RM100,000 as aggravated damages as the defendant was not malicious in the limited publication top persons with corresponding interests; and

(f) the costs of RM60,000 was excessive.

The submission of the defendant/appellant

[17] Learned counsel for the defendant submitted that the words used in the impugned letter were made in the ordinary course of business. There were no allegation or implication of any specific conduct or reasons which caused ML to resign. The statement made in reference to ML's resignation did not in any manner disparaged the plaintiff's reputation. It was submitted that the High Court judge had erred by disregarding the defendant's statement in respect of ML resigning was consistent with her testimony in court. ML had given evidence that she during her tenure as CEO of Pakar she faced numerous difficult issues which ultimately led to her resignation. Furthermore, the words 'ML was treated badly' were the plaintiff's own allegation and not the words use or mentioned in the impugned letter.

[18] The impugned letter was copied to four of Pakar's directors who all had common legitimate interest in Pakar and to the specific solicitor. The purpose of the impugned letter was to respond to the plaintiff's queries and allegation and at the same time updating the four directors and the specific solicitor the status of pending issues facing Pakar. The impugned letter was made in the ordinary course of business. It was sent in a sealed envelope to the attention of a specific solicitor of the firm acting for the parties in the various suits filed by the plaintiff. There was no evidence that anyone in the firm of the staff had read the said letter. The plaintiff himself had admitted in his testimony that he did not know of any publication of the aforesaid letter. In fact there was no evidence that impugned letter was circulated to Carat's in house counsel or to its regional office as alleged by the plaintiff .

[19] The defendant was rightfully nominated and appointed by Carat to replace ML as CEO. His appointment was endorsed by Pakar's Board of Directors.

[20] The plaintiff alleged that the defendant was motivated by malice however did not give any particulars of the facts and matters from which the express malice was to be inferred. The impugned letter was only in relation to Pakar's internal affairs and did not have any other effect. It was not disputed that the plaintiff chose to highlight his disputes with Carat and Pakar directors in the public domain by filing the various legal actions and by advertising his injunction order in the newspapers. The impugned letter did not create any impact on any third party nor did it in any way affect or damage the plaintiff's reputation.

[21] With regard to damages, learned counsel submitted that even if the impugned letter was found to be defamatory the award should be compensatory and reasonable.

The submission of the plaintiff /respondent

[22] It is the submission of learned counsel for the plaintiff that the impugned letter in their natural and ordinary meaning meant and were understood to mean that the plaintiff was amongst others, a thief, dishonest, in breach of his fiduciary duties, a vexatious litigant, incompetent and committed various wrongdoings.

[23] Learned counsel further submitted that the defendant did not plead justification and in light of this there was a need to go in to the truth of the offending statements. There was absolutely no doubt that the offending statements referred to the plaintiff and that the impugned letter was issued to a third party.

[24] It was further submitted by learned counsel for that the defence of qualified privilege was correctly rejected by the High Court judge for the following reasons:

(a) the impugned letter was not addressed to the company's solicitors but to third parties who did not have any interest;

(b) the defendant had wrote the impugned letter as a CEO designate on a Carat letterhead and not that of Pakar's; and

(c) when the defendant wrote the letter, he was not appointed as CEO of Pakar and therefore had no interest or duty to write such a letter on behalf of Pakar.

[25] It was argued that the offending statements contained factual assertions and conclusions and were not preceded by guarded language. The offending statements and the imputations were libelous as there was insufficient substratum of facts stated to enable the readers to distinguish between the facts and the comments. Furthermore, the defence of fair comment could not succeed as the statements of facts in the impugned letter were not proven to be true.

[26] The damages awarded was fair and should not be disturb.

DECISION

[27] The defendant had stated in the impugned letter that the purpose of the said letter was in response to the plaintiff's resignation letter as well to the various memoranda he had sent to ML. In the same letter, the defendant informed the plaintiff that he was nominated by Carat to take over the CEO position in Pakar subject to compliance with all the necessary legal formalities

and the endorsement of the Board of Directors .He was instructed by ML to respond to the issues raised by the plaintiff in all the memoranda that he had sent to her.

[28] It is trite that to establish the tort of defamation the burden is on the plaintiff to prove that the statements made in the impugned letter:

(a) were capable of bearing the defamatory meaning put forward;

(b) referred to the plaintiff; and

(c) published by the defendant to a third person.

(re *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315) at p 316; [1989] 1 CLJ Rep 321 at p 324).

[29] Based on the facts and evidence the alleged defamatory statements referred to the plaintiff with regards to the issues in the various correspondences and /or memoranda that he had sent to the CEO of Pakar. The questions that remained were whether the offending statements were defamatory and whether said impugned letter was published by the defendant to a third person.

Whether the statements were defamatory

[30] Mohamed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58 said:

> ... the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

The statement with regards to ML's resignation

[31] In the impugned letter with regards to ML's resignation as CEO, the defendant had stated as follows:

> Margaret Lim wishes to resign from her position as Chief Executive Officer of Pakarmedia, not least in part due to your past and recent conduct in respect of Pakarmedia and her personally.

[32] ML gave evidence that she had briefed the defendant on the matter prior to the issuance of the impugned letter. There were many issues facing Pakar and Carat such as nonpayment of debts, refusal to sign cheques etc. ML

had resigned as she had to manage eight companies under the Aegis Group as well as handling the ongoing suits against Pakar filed by the plaintiff.

[33] In a claim for defamation, the approach to the construction of words alleged to be defamatory has been clearly laid down by Justice Richard Malanjum, J (as he was then) in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304 where His Lordship said:

> The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[34] In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, LP Thean J, succinctly explained what is natural and ordinary meaning of the word at pp 318–319:

> In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park on that evening using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons: see para 4.04 of Duncan and Neill on Defamation (2nd Ed) ...

[35] The impugned letter was devoid of any mention or reference of any form of ill treatment of ML by the plaintiff. Learned counsel for the defendant submitted that the words 'ML was treated badly' were words used by the plaintiff. We are of the considered views that the words in its natural and ordinary meaning were not defamatory or had disparaged the plaintiff. The learned High Court judge had erred when she disregarded the testimony of ML herself who had explained to the court her reason for resigning.

The threats

[36] In the impugned letter, the defendant had stated that the allegation made by the plaintiff against an employees of tampering with Pakar's official documents and records are unfounded:

> Your threats and allegations against Looi, a Carat employee, are completely unfounded and he has not in anyway tampered with Pakarmedia documents and

> records. Your demand is petty and completely unwarranted and will be highlighted to the relevant authorities should you attempt to pursue any baseless police report.

[37] Prior to this the plaintiff had sent numerous memoranda and letters to YH Looi who was a Carat employee as well to ML demanding access to his emails and threatening action for alleged tampering of official records and documents of Pakar without his consent. The defendant explained in the said letter that Pakar's email was accessible only to its current employee:

> Pakarmedia is only accessible to its management and staff currently employed by the company and your email has been cut off following your resignation.

[38] The High Court judge fell into error when she agreed with the submission of the plaintiff that there was no proof of harassment by the plaintiff thus the words in the statement above are defamatory. As LP Thean J, in the case of *Jeyaretnam Joshua Benjamin v Lee Kuan* said explained that in determining the natural and ordinary meaning of the words complained of, the sense or meaning intended is irrelevant nor meaning in which the words as understood by the plaintiff relevant. Even extrinsic evidence should not be considered admissible in construing the said words. The meaning must be gathered from the actual words used in the context of the of the impugned letter. Having examined the words used in the offending statements, we are of the considered view that the defendant was responding to the plaintiff's memoranda on email access and thus, was made in the ordinary course of business.

The statements with regards to recovery of debts and actions filed

[39] With regard to the multitude suits filed against the company as well as recovery of debts, the defendant had stated in the impugned letter that:

> I will be recommending to the Pakarmedia Board of Directors that Pakarmedia should be taking all steps necessary to recover payment of the costs incurred in having to defend the frivolous actions filed both in seeking the injunction and in purporting to see the appointment of auditors.

[40] Having scrutinised the impugned letter, we are of the considered view the aforesaid statements taken in its ordinary and natural meaning merely explained the stand of Pakar in relation to the costs involved in defending all the suits. The statements were clearly made by the defendant in the ordinary course of business.

The other alleged defamatory statements

[41] Learned counsel for the defendant argued that the statements were in fact the plaintiff's own words and not the actual words in the impugned letter. The impugned letter explained to the plaintiff his concerns of the operational issues in the company. The defendant also explained to the plaintiff that with regard to his rights as a director of Pakar, he can raised his concerns at the Board of Director's meetings. In the impunged letter, there were no statements disparaging the plaintiff's reputation neither were there any mention of dishonesty nor any breach of fiduciary duties as alleged by the plaintiff.

[42] We are of the view that the impugned letter concerned the operational issues and did not refer to the plaintiff's character in the manner as alleged.

[43] In a defamation action, the defence of justification is a complete defence if it succeeds. To succeed in the defence of justification, the defendant must establish the truth of all the material statements in the words complained. To justify such comments, it was necessary to show that the statements were the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail if the truth of every charge was not proven to be true and do not materially injure the plaintiff's reputation.

[44] We have perused the impugned letter in details and it was our considered view, on plain reading of the words used in the said letter, the defendant was responding and explaining the issues raised by the plaintiff in previous correspondences. By doing so, he was merely carrying out his duty as the CEO of Pakar. We are of the considered view that the statements were general statements made in the ordinary course of business and not capable of being understood to be defamatory in the manner as alleged by the plaintiff.

Whether the statements were published to third person

[45] Lord Esher, MR in *Pullman and another v Walter Hill & Co, Limited* [1891] 1 QB 524 said at p 527:

> ... What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise.

[46] It is insufficient that the words complained of contained the impugned letter be merely communicated to third parties. It is also a requirement that it

be communicated in such a manner that it conveys the defamatory meaning and that persons acquainted with the plaintiff must understand it to refer to him.

[47] The impugned letter was only copied to four specific persons, the directors and the specific solicitor. The impugned letter was sent in a sealed envelope with the acknowledgement of receipt on the envelope and the contents intact. There were no evidentiary proof that the impugned letter was widely circulated or anyone in the firm had read the letter.

Qualified privilege

[48] As stated above, the defendant was appointed by the Carat as CEO to look after the affairs of Pakar. He had acted upon instruction of ML to respond to the various issues raised by the plaintiff.

[49] The plaintiff did not give any particulars of the facts and matters in which malice can be inferred. Further, there were no proof that the defendant had acted recklessly or maliciously against the interest of the company. He had no interest or any personal interest in Pakar. He was faced with burgeoning issues plaguing the company. The company was in a critical position and there was a need for him to act immediately by responding to the issues raised by the plaintiff. In essence, the impugned letter did not contain any element maligning the plaintiff's character other than stating specific facts relating to the ordinary course of business.

CONCLUSION

[50] Having considered the decision of the learned High Court in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we were of the respectful view that there was an appealable error that had been shown by the appellant that could properly justify an appellate intervention.

[51] Based on the foregoing reasons, we allowed the appeal with costs of RM70,000 here and below subject to the payment of allocator fee. The decision of the High Court was set aside. The deposit refunded.

Appeal allowed with costs of RM70,000 here and below subject to allocatur; decision of the High Court set aside.

Reported by Dzulqarnain Ab Fatar